

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2244

Cir. Ct. No. 2011CF70

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEROY K. ZITTLow,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Taylor County:
ANN KNOX-BAUER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Leroy Zittlow appeals an order denying his WIS. STAT. § 974.06 (2015-16)¹ motion for postconviction relief. Zittlow argues the circuit court erroneously exercised its sentencing discretion by relying on improper or inaccurate information and his trial counsel was ineffective by failing to object. Because Zittlow has failed to preserve his challenge to the circuit court’s sentencing discretion and his derivative ineffective assistance claim, we will not address them. Zittlow alternatively appears to seek resentencing based on the ineffective assistance of his trial counsel, as alleged in his postconviction motion. We reject Zittlow’s preserved arguments and affirm the order.

BACKGROUND

¶2 Zittlow was convicted upon his no-contest pleas of first-degree sexual assault of a child under the age of thirteen and causing a child to view sexual activity. The circuit court imposed concurrent sentences resulting in a fourteen-year term, consisting of nine years’ initial confinement followed by five years’ extended supervision. Zittlow filed the underlying WIS. STAT. § 974.06 motion for a “new trial” on grounds his trial counsel was ineffective by failing to communicate with Zittlow regarding Zittlow’s responses to the allegations; failing to hire an investigator; failing to review Zittlow’s medical records; failing to investigate the “victim’s history of lying and stealing”; and failing to fully advise Zittlow of the ramifications of his pleas. The circuit court denied the motion after a *Machner*² hearing. This appeal follows.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

DISCUSSION

¶3 Zittlow argues the circuit court erroneously exercised its discretion when it sentenced him based upon his gender and “inaccurate information.” Specifically, Zittlow challenges the sentencing court’s reference to him as a “lecherous” old man “preying upon girls, young girls,” when Zittlow was convicted of having sexual contact with only S.K. Additionally, Zittlow contends the sentencing court erroneously exercised its discretion by failing to resolve the conflict over the number of times he sexually assaulted S.K. Zittlow, however, has failed to preserve these arguments because he did not raise them in the circuit court.

¶4 “Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal.” *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Relevant to this case, “[a] postconviction motion in the circuit court is a prerequisite to appellate review when a defendant challenges a sentence as an erroneous exercise of discretion, unless compelling circumstances justify overriding this requirement.” *State v. Walker*, 2006 WI 82, ¶31, 292 Wis. 2d 326, 716 N.W.2d 498.

¶5 Zittlow’s postconviction motion in the circuit court failed to raise these challenges to his sentence. For the first time in his reply brief, Zittlow nevertheless asserts there are compelling reasons to justify consideration of his arguments on their merits. Developing an argument for the first time in a reply brief, however, impermissibly deprives the respondent of an opportunity to respond. See *Swartwout v. Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981). We decline Zittlow’s invitation to address his reply argument, and we

deem his challenges to the sentencing court's discretion unpreserved for this appeal.

¶6 Zittlow alternatively seeks resentencing on grounds his trial counsel was ineffective.³ To establish ineffective assistance of counsel, Zittlow must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance resulted in prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, Zittlow contends his trial counsel was ineffective by failing to object to the sentencing court's reliance on what Zittlow deems to be improper and inaccurate information. As noted above, Zittlow failed to preserve his challenge to the circuit court's sentencing discretion. Because Zittlow also failed to raise this derivative challenge to trial counsel's performance in the circuit court, the argument is not preserved for appeal and we will not address it. *See Huebner*, 235 Wis. 2d 486, ¶10.

¶7 Next, Zittlow asserts his trial counsel was ineffective by failing to hire an investigator to interview S.K. and other potential witnesses, in order to prove S.K. was lying about the number of times she was sexually assaulted. S.K. alleged the assaults occurred every other day over a period of eleven months, while Zittlow admitted to only three sexual assaults. Zittlow asserts that had S.K.'s credibility been properly challenged, the conflict over the frequency of the assaults "would likely have been resolved" in Zittlow's favor. Thus, according to

³ Although Zittlow's postconviction motion sought a "new trial," Zittlow pleaded no contest and does not allege on appeal that but for counsel's claimed errors, he would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Because Zittlow does not develop an argument for plea withdrawal, we construe his arguments as addressing only whether he was deprived of the effective assistance of counsel for sentencing purposes.

Zittlow, his trial counsel should have provided the sentencing court with information to cast doubt on S.K.'s allegation regarding the frequency and duration of the assaults.

¶8 Zittlow contends he informed his trial counsel that S.K. lied about the number of assaults and had trial counsel properly investigated the matter, he would have learned: (1) S.K. has “a history of lying and stealing,” including the theft of a cell phone and money from her father’s wallet; (2) S.K. apologized to Zittlow’s wife in the presence of S.K.’s parents, saying “I’m sorry I told lies”; and (3) S.K. suffered a brain injury which may have impacted her credibility on the frequency of the alleged sexual contacts.

¶9 The fact that Zittlow told his trial counsel S.K. lied about the number of sexual assaults does not establish that S.K. did indeed lie, which showing would be necessary to demonstrate the circuit court’s reliance on inaccurate information. In any event, at sentencing, defense counsel challenged the frequency of the claimed assaults, emphasizing that Zittlow was bed-ridden following open-heart surgery during three months of the alleged time period. Even if we assume trial counsel was deficient by failing to discover and utilize additional evidence to challenge S.K.’s credibility, we are not convinced that any of the proffered evidence would have cast doubt on S.K.’s credibility as to the frequency of the assaults. Zittlow’s acknowledgement that he assaulted S.K. on three occasions is an implicit concession that S.K. was telling the truth when she reported the sexual assaults, thus bolstering her credibility. Because it is unlikely that evidence of S.K.’s purported history of lying and stealing would have resulted in a different outcome at sentencing, we are not persuaded that Zittlow was prejudiced by this claimed deficiency of trial counsel.

¶10 In addition, with respect to S.K.’s alleged statement to Zittlow’s wife that she was sorry she lied, it is not clear from Zittlow’s postconviction motion what S.K. was referring to when she allegedly apologized for lying. Moreover, Zittlow acknowledges the statement was made post-sentencing. Trial counsel cannot be ineffective by failing to discover or investigate a conversation that occurred after sentencing.⁴ Further, Zittlow has not established any causal connection between S.K.’s alleged brain injury and her ability to recall the assaults. “A showing of prejudice requires more than speculation.” *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). Ultimately, Zittlow has failed to establish that he was prejudiced at sentencing by any deficiency on counsel’s part in failing to pursue the delineated information regarding S.K.’s credibility.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

⁴ Postconviction counsel noted at the motion hearing that he was unable to obtain corroboration to present the statement as newly discovered evidence.

